Petition

81-1588

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ALEXANDER L. STEVAS
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No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

People of the State of Illinois
ex rel. LOWELL MYERS,

Petitioner,

—VS—

ETHEL MEWS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

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THE QUESTION PRESENTED FOR REVIEW

This case involves the legal rights of elderly people who have been held to be incompetent, and who have been placed in nursing homes.

In the city of Chicago, at this time, the estates of such elderly people are being handled in secret and ex-parte court hearings. At such hearings, nobody at all represents the elderly person; there is no court reporter present; no record is made of the proceeding; appeals are impossible; and the court refuses to let any interested persons be present at the hearing.

The result of this system (very predictably) has been that the estates of such elderly persons in Chicago have been systematically defrauded on a wholesale basis. An official report to the Governor of Illinois (prepared at his request) studied a large group of such estates and found that an enormous number of them contained false accounting which had been used to defraud the elderly person.

The question presented by this case is whether secret and ex-parte hearings can be used to decide the legal rights of elderly incompetent persons.

In 1958 the U.S. Supreme Court decided a similar case involving secret and ex-parte hearings that were used against minors. The court held that such secret hearings are unconstitutional. (*In re. Gault.*) The question in this case is whether the Constitution protects elderly people just as it protects young people. We submit that it does.

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OPINION OF THE COURT BELOW

The Order and opinion of the Appellate Court of Illinois in this case is set forth in the Appendix to this Petition. It has not been published. The Order of the Supreme Court of Illinois denying Leave to Appeal is set forth in the Appendix. It has not been published.

BASIS OF U.S. SUPREME COURT JURISDICTION

The decision of the Appellate Court of Illinois was issued on September 2nd, 1981. A Petition for Leave to Appeal was timely filed in the Illinois Supreme Court on October 21, 1981. That Petition was denied by the Illinois Supreme Court on November 30th, 1981. This Petition to the U.S. Supreme Court has been timely filed with the U.S. Supreme Court within 90 days of that date.

The U.S. Supreme Court has jurisdiction of this case under 28 U.S.C. 1257(3) and 28 U.S.C. 2101(c).

THE CONSTITUTIONAL PROVISION THAT IS INVOLVED IN THIS CASE

"No State shall . . . deprive any person of life, liberty, or property, without due process of law; . . ."
14th Amendment to the United States Constitution

STATEMENT OF THE CASE

In the city of Chicago, a system of secret and ex-parte court hearings has been used for many years — in regard to the financial estates of elderly persons who have been declared to be incompetent.

An official report on the matter was requested by the Governor of Illinois. The report studied a group of about 100 such estates in Chicago and found that false accountings had been systematically filed in a large number of them. The report stated that ". . . hundreds of thousands of dollars . . ." appeared to be missing from these estates.

This system of secret and improper hearings has not been changed and it is still in full force in Chicago at this time.

Mr. William Erdmann, the person involved in this case, is an elderly deaf man who was found to be incompetent to handle his financial estate. A woman named Ethel Mews was appointed to be the guardian of his estate, and she took possession of all of his assets.

Mr. Erdmann has no wife, no children, and no brothers or sisters. However, he does have one life-long friend: Mr. Myers.

Mr. Myers (the friend) wanted to visit Mr. Erdmann in the nursing home, but he did not know where the home was located. He called the guardian and asked for Mr. Erdmann's address. The guardian refused to reveal Mr. Erdmann's location.

Mr. Myers was an attorney and he knew that under Illinois law the guardian was required to keep Mr. Erdmann's location on public record. Myers examined the court file to find out Mr. Erdmann's present address. He found that the address was not on file. However, he also found out something else. He found that the guardian

had filed no accounting for any of Mr. Erdmann's funds, for more than 7 years. The guardian had taken in at least $27,000 of funds belonging to Mr. Erdmann, and had never accounted for any of it.

Myers then filed a petition in the Circuit Court located in Chicago. He filed the petition acting as a legal ". . . next friend. . ." to Mr. Erdmann. Under Illinois law, any person can act as a ". . . next friend . . ." to an incompetent person; and can take any legal action that is necessary to protect such a person.

This ". . . next friend . . ." rule of law has been part of the common law for hundreds of years. It has been part of the laws of Illinois ever since the state was created. This is also the law today in most of the states of the nation.

When Mr. Myers' petition as ". . . next friend . . ." came before the court, the court issued an Order that the guardian must file an accounting within 30 days. This accounting was to cover the entire 7 year period which she had not yet accounted for.

Myers, as legal ". . . next friend . . ." to Mr. Erdmann, asked that he be given notice of the date of the court hearing that would be held upon the proposed accounting, so that he could be present at that hearing. The trial judge ruled that Myers should **not** be given notice of the date of the hearing.

Myers also asked that he be given a copy of the proposed accounting, so that he could examine it prior to the time that the court might approve it. The court ruled that a copy of the proposed accounting should **not** be given to Mr. Myers.

The trial judge indicated that he (the judge) would represent Mr. Erdmann at the hearing, and that nobody else should be present.

This case involves the constitutional question of whether a trial judge can "represent" one of the parties to the case (an incompetent person), and then use that alleged "representation" as a ground for excluding everybody else from the courtroom.

There is also a question as to whether a trial judge can keep the date of a court hearing secret and thus make it impossible for anybody to find out what takes place there.

This constitutional question of "Due Process of Law" was raised in the trial court and at each step in the appeals process. The various quotations from the record are set forth in the Appendix.

THE REASONS WHY THE WRIT OF CERTIORARI SHOULD BE GRANTED

The system of secret and ex-parte hearings that is being used in the city of Chicago at this time is completely unconstitutional.

The federal courts have held repeatedly that ex-parte hearings are unconstitutional. (See *In re. Gault,* 1966, 387 U.S. 1, 42.)

> " . . . a mere ex-parte proceeding—has no proper place in a court of justice."
>
> (*Barry* v. *Hall,* 1938, 98 F. 2d 222 (D.C. Cir.) 226.)

See also, *Dale* v. *Hahn,* 1974, 486 F. 2d 76, 79 (USCA 2nd); *Heryford* v. *Parker,* 1968, 396 F. 2d 393.

Before the court can enter an order concerning the estate of the incompetent person (taking away his funds) somebody must be representing the interests of the incompetent person.

The Conservatrix Cannot Represent Mr. Erdmann, Where Her Own Accounting Is Involved

The conservatrix cannot represent Mr. Erdmann where her own accounting is involved. It is to her advantage to make mistakes in the accounting, and thus take funds away from Mr. Erdmann. Since her own conflicting interests are involved, she cannot represent him at that hearing.

The Trial Judge Does Not Represent The Incompetent Person

The trial judge cannot represent Mr. Erdmann at the hearing. The judge has no time and no facilities to conduct an investigation. If the judge took off his judicial robe and turned himself into an investigator, he would disqualify

himself as a judge. He cannot be both a judge and an investigator.

Moreover, if the trial judge were representing Mr. Erdmann, then he would have the duty of taking appeals from his own incorrect judgments. Of course, he would not do that. If the trial judge were to "represent" Mr. Erdmann, the result would be that Mr. Erdmann's rights of appeal would disappear into thin air.

The Correct Basic Principle Was Set Forth By The U.S. Supreme Court In The Case Of "In Re Gault" (1966)

The U.S. Supreme Court has already set forth the correct basic principle, in regard to cases involving the rights of incompetent MINORS.

For many years, up to 1966, juvenile court judges followed the idea that it was not necessary for anybody to represent the minor in a juvenile court proceeding, because ". . . the judge will represent the minor." In 1966 the U.S. Supreme Court held that this was nothing but a cruel and harmful fiction. The judge did not really represent the minor. The idea was merely a pretense used to take away the minor's constitutional rights. The Supreme Court held flatly:

> "Nor can the judge represent the child." (*In re. Gault,* 1966, 387 U.S. 1, 33.)

The U.S. Supreme Court held that a minor MUST be represented at court proceedings, and that this cannot be done by the judge (who has an entirely different function).

It cannot be doubted that exactly the same rule applies to incompetent persons, as applies to minors.

> "• • • Where, as in both proceedings for juveniles and mentally deficient persons, the state undertakes to act in parens patriae, it has the inescapable duty to vouchsafe due process . . ." *Heryford* v. *Parker,* (10th Cir.) 1968, 396 F. 2d 393, 396.

Due process requires proper representation, and proper notice of hearings. Due process does not allow fictitious representation by a person with conflicting interests; or fictitious representation by the judge.

Interested Parties Should Be Given Notice Of Court Hearings

Mr. Erdmann has no wife, no children, and no sisters or brothers. He is alone in the world, except for his life-long friend.

Mr. Myers has a clear legal right under Illinois law to act as ". . . next friend . . ." to Mr. Erdmann and take steps to protect him. (We shall omit the citations to the Illinois law on this subject at this time. However, the law is clear in Illinois, and this is probably the law in most of the states of the nation. The common-law rule has existed for hundreds of years.)

Mr. Myers, the "next-friend" to Mr. Erdmann, is asking that he should be given notice of court proceedings concerning Mr. Erdmann. If he is given such notice, he will be able to investigate what the conservatrix is proposing to do, and he will then be able to put on record important matters that the court should know about.

The more information a court has, the better its decisions are going to be. The less information it has, the worse its decisions will be.

A court should seek to make its sources of information as broad as possible (not as narrow as possible).

It will not be beneficial to Mr. Erdmann to turn the court proceeding into a secret ex-parte hearing, with no possibility of an appeal if the court makes a mistake due to lack of proper information.

A court should **avoid** secret and ex-parte hearings whenever possible.

The Decision Of The Appellate Court Of Illinois

The Appellate Court of Illinois, First District, is located at Chicago, in the same building where the Circuit Court is located. The Appellate Court decision is set forth in the Appendix.

The Appellate Court was unable to find any case, anywhere in the United States, that would uphold this system of holding secret and ex-parte hearings on the estates of incompetent persons. (There is no law anywhere in the United States to support such an illegal system.)

The Appellate Court simply avoids mentioning the U.S. Constitution, and avoids mentioning "due process of law", and talks about other matters. The Appellate Court decision says exactly three different things, as follows:

1. First, the Court says that the parties to the case did not **like** each other. This is a rather odd thing to say; because the parties to a case almost **never** like each other!

Is the court saying that any time the parties to a case do not like each other — the result is the United States Constitution should be considered void? If so, the Constitution would be rendered meaningless.

Whether the parties to this case liked each other, or not, is irrelevant. We are here to determine whether the Chicago courts can continue to use secret hearings to take funds away from elderly incompetent people. That is a serious question and it deserves a serious answer.

When the Appellate Court talks about whether the people liked each other, the court is simply avoiding the real question and talking about irrelevancies.

2. Second, the Appellate Court of Illinois says that the legal ". . . next friend . . ." should not be allowed to see the proposed accounting, and he should not be allowed to know the date of the secret court hearing, because:

(from Appellate Court decision)

"... the trial court was in the best position to determine what actions were necessary to protect the estate of the incompetent ..."

The Appellate Court says that if the hearing is kept secret and nobody is allowed to know about it, and nobody is allowed to testify and put evidence on record — then the result will be that — the trial court will be in the best position to know what to do.

This is a **remarkable** argument. It is quite false. If the trial court refuses to let people testify, then it is going to be in a very poor position to judge anything. A court's decisions are not going to be any better than its sources of information.

The idea that a trial court should not listen to evidence because (somehow or other) it already knows everything, is incorrect. That whole idea was held to be **unconstitutional** by the U.S. Supreme Court in the case of *In Re. Gault*, 387 U.S. 1.

3. Third, the Appellate Court in Chicago says that the illegal system of ex-parte hearings should be allowed to continue in Chicago, for the following reason:

Because Myers could "... monitor the court files ..." from time to time, and if he later finds evidence of fraud, then he could (at that later time) try to get the judgments reversed and get the guardian removed from office.

There are two things wrong with that idea:

A. The U.S. Supreme Court has stated as clearly as anybody could state anything—that due process of law requires notice BEFORE judgment is entered; (not afterwards). The Court said:

> "Notice, to comply with due process requirements, must be sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded. . . ."
>
> (*In re. Gault*, 1966, 387 U.S. 1, 33.)

So, the Appellate Court's suggested remedy that somebody could rummage through the court files from time to time and try to find out about fraudulent judgments, and try to get them opened up — later on — does not meet the requirements of due process of law.

B. In addition, as a practical matter, it would be totally ineffective to try to get fraudulent judgments opened up, later on, after they have already been entered. The guardian would have no court reporter at the secret hearing. Since there was no court reporter, there would be no record at all and no appeal could be taken. (You cannot appeal without a record.)

In addition, there is a rule of law that you cannot raise any issue on appeal unless you first raised it in the trial court. Since the "next friend" did not raise the issue of fraud in the trial court, (since he wasn't there) he could not raise it on appeal.

Trying to open up a fraudulent judgment after it has been entered could take years of time, and would probably be completely ineffective. Of course, that's exactly why due process of law requires notice and proper representation **before** a judgment is entered, and not afterward. (See *In Re. Gault*, 387 U.S. 1, 33.)

The Appellate Court decision does not meet the constitutional issues. It ignores them. That Opinion has only one motive and one purpose — to keep this ex-parte system operating as long as possible. But, this is an evil and unconstitutional system, and it should be stricken down.

Conclusion

The system of secret hearings being used in the Chicago courts is one that breeds fraud **and corruption.** It is wholly unconstitutional. It should be stricken down exactly as this court did in the case of *In Re. Gault,* in 1966.

The Writ of Certiorari should be issued.

Respectfully submitted,

Lowell Myers,
for the Petitioner,
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Chicago, Illinois 60626,
(312) 875-9020.

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APPENDIX

Order of the Circuit Court of Cook County, Illinois (Located at Chicago)

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, PROBATE DIVISION

In the Matter of the Estate of William Erdmann, Incompetent	No. 68 P. 6839 Docket 158 Page 191

ORDER

Upon the Court's Motion

IT IS ORDERED that ETHEL MEWS, the Conservatrix of WILLIAM ERDMANN, herewith is ordered to file an accounting for this estate within 30 days.

It is further ordered that the Conservatrix is NOT required to give notice to Lowell Myers of the Report of Condition, copy of current accounting, notice of Mr. Erdmann's location, or notice of these proceedings.

Richard E. Dowdle,
Judge.

Entered Feb. 29, 1980.

Order and Opinion of the Appellate Court of Illinois (Located at Chicago)

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT
No. 80-822

IN RE. THE ESTATE OF WILLIAM ERDMANN, INCOMPETENT

LOWELL MYERS,
Petitioner-Appellant,

vs.

ETHEL MEWS,
Respondent-Appellee.

Appeal from the Circuit Court of Cook County

Honorable Richard E. Dowdle, Judge Presiding.

ORDER DISPOSING OF APPEAL
UNDER SUPREME COURT RULE 23

This is an appeal from an order of the circuit court of Cook County which held that Ethel Mews, the conservator of the Estate of William Erdmann, an incompetent, was not required to give the petitioner, Lowell Myers, notice of certain matters concerning Erdmann and the administration of his estate.

On July 19, 1968, Lowell Myers, an attorney, filed a petition in the circuit court of Cook County which asked the court to enter an order declaring Erdmann incompetent and appointing Erdmann's niece, Ethel Mews, conservator of his estate. On August 16, 1968 such an order was entered.

On February 22, 1980, Myers filed a petition with the court in which he stated that he had been a close friend of Erdmann for over 30 years. Myers stated that he had contacted Mews in order to determine the name and location of the nursing home in which Erdmann resided.

Myers asserted that Mews refused to provide this information. Subsequently, Myers examined the court file concerning the estate and discovered that Mews had not filed an accounting for the estate for over 7 years in violation of the court's rules. Rule 12.14(c)(i) of the rules of the circuit court of Cook County provides that:

> "Each guardian shall present an account of his administration within 30 days after the expiration of one year after issuance of letters and unless otherwise ordered, at least one in each year thereafter."

Myers asked the court to order Mews to file a "report on condition" indicating the address of Erdmann, an accounting for the estate, and a copy of her surety bond. In addition, Myers asked the court to order Mews to give him notice of any change in the location or condition of Erdmann and notice of all legal proceedings concerning Erdmann or his estate.

At the hearing on the petition, Mews' attorney indicated that animosity developed between Myers and Mews concerning attorneys fees Myers had billed the estate. Counsel also informed the court that Erdmann had been living in the same nursing home for five years and that a current accounting would be filed within 30 days.

Myers informed the court that it was necessary for him to have notice of Erdmann's condition and of the legal proceedings because it was necessary to "keep an eye on this lady." The trial court advised Myers that it was the court's responsibility to supervise the administration of the estate and denied Myers' request for this information.

On appeal Myers asserts that it is in Erdmann's best interest that Myers be given notice of important matters affecting Erdmann. Myers insinuates that Mews may be guilty of fraud in connection with the administration of the estate. In addition, he discusses the problems facing

elderly people in nursing homes and suggests that a conservator who is also an heir of the incompetent may have a strong motive to see that the incompetent dies as quickly as possible. Furthermore, Myers contends that the trial court is not in a position to determine whether an accounting filed by a conservator is fraudulent.

Mews has not filed a brief as appellee in this court. However, under the authority of *First Capitol Mortgage Corp.* v. *Talandis Construction Co.* (1976), 63 Ill. 2d 128, 345 N.E. 2d 493, we shall consider the merits of the appeal.

We believe that the trial court was in the best position to determine what actions were necessary to protect the estate of the incompetent. The trial court was aware of the animosity between the petitioner and the conservator. The trial court was also aware that the only specific act of misconduct alleged by Myers was Mews' failure to file a current accounting. Her attorney advised the court that this situation would be corrected immediately. The trial court's determination that it could adequately supervise the administration of the estate was not against the manifest weight of the evidence.

Although we believe that Myers has a genuine concern for the welfare of Erdmann, we must note that his accusations and innuendos concerning Mews' conduct are not supported by any evidence. Vouchers contained in the record reveal that Mews accounted in detail for prior expenditures on behalf of the incompetent. We are certain that Myers will continue to monitor the court file on this matter, and if he discovers any waste or mismanagement, he can file a petition for the removal of the conservator. Ill. Rev. Stat. 1979, ch. 110½, par. 23-2.

For the foregoing reasons, the judgment of the circuit court of Cook County is hereby affirmed.

Dated at Chicago, Illinois, this 2nd day of September, 1981.

Illinois Supreme Court Order

UNITED STATES OF AMERICA

State of Illinois
Supreme Court } SS.

BE IT REMEMBERED, that, to-wit: on the 30th day of November, 1981, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

In the Matter of the Estate of
William Erdmann,

People ex rel. Lowell Myers,
Petitioner,

vs.

No. 55676
Ethel Mews,
Respondent.

Petition for Leave to Appeal from Appellate Court First District 80-822

And now on this day the Court having duly considered the Petition for Leave to Appeal herein and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies Leave to Appeal herein.

And it is further considered by the Court that the said Respondent recover of and from the said Petitioner costs be her in this behalf expended, to be taxed, and that she have execution therefor.

SEAL

Supreme Court of the
State of Illinois

THE CONSTITUTIONAL QUESTION WAS RAISED IN THE ILLINOIS COURTS

In the Circuit Court:

MR. MYERS: Your Honor, I would like to put one more matter on record and that is that there is a Constitutional Question involved here under Due Process of Law . . . I just want to say that the court passes upon that point in making that decision.

THE COURT: All right.

(Transcript T-17, T-18.)

In the Appellate Court of Illinois:

"Ex parte hearings have been severely condemned by the courts as being unjust, illegal, and unconstitutional."

(Page 4 of the Appellant's Brief.)

(See also page 20.)

In the Supreme Court of Illinois:

"It has been held repeatedly that ex-parte hearings violate the United States Constitution."

(Petition for Leave to Appeal, page 3)
(see also page 18.)

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